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IN THE

Supreme Court of the United States

Nos. 56 and 80 OCTOBER TERM, 1963

Francis L. Van Dusen, United States District Judge, et al.,
Petitioners

v.

Roberta Barrack, Administratrix, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

Of Counsel:

RICHTER, LORD, TOLL & CAVANAUGH
121 South Broad Street
Philadelphia 7, Pennsylvania

KRUSEN, EVANS AND BYRNE
21 South 12th Street
Philadelphia 7, Pennsylvania

KREINDLER & KREINDLER
99 Park Avenue
New York 16, N. Y.

MORGAN, LEWIS & BOCKIUS
2107 Fidelity-Philadelphia Trust Building
Philadelphia 9, Pennsylvania

FREEDMAN, LANDY AND LORRY
1415 Walnut Street
Philadelphia 2, Pennsylvania

SEYMOUR I. TOLL
Attorney for Respondents Barrack, et al.

T. E. BYRNE, JR.
Attorney for Respondents Biernbaum, et al.

LEE S. KREINDLER
ABRAM P. PIWOSKY
DAVID M. HASS
Attorneys for Respondents Laister, et al.

JOHN R. MCCONNELL
RALPH EARLE II
Attorneys for Respondents Rapp, et al.

ABRAHAM E. FREEDMAN
MILTON M. BOROWSKY
MORRIS S. FINKEL
Attorneys for Respondents Thompson, et al.

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OPINIONS BELOW

The opinion of the district court appears at 204 F. Supp. 426 and at pages 1-20 of the Record.

The opinion of the court of appeals, as amended, appears at 309 F.2d 953 and at pages 71-77 and 95-96 of the Record.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a district court order a civil action transferred to a district in which plaintiff fiduciary lacks capacity to sue?

Answered in the negative by the court of appeals.

2. May a district court, in an effort to facilitate the disposition of numerous cases arising from a single airplane disaster, order a group of civil cases transferred to another district at great expense, inconvenience and delay to plaintiffs and to the grave prejudice of their substantive rights under the law of damages?

Not answered by the court of appeals.

STATUTE AND RULE INVOLVED

Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Rule 17(b) of the Federal Rules of Civil Procedure, provides, in pertinent part:

> "CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . . In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

STATEMENT OF THE CASE

I. The identity of the parties.

Petitioners are:

(a) Various domestic corporations and the United States, all of whom are defendants in certain actions for wrongful death brought by Respondents in the Eastern District of Pennsylvania (R. 72) (these Petitioners are hereinafter referred to as "defendants"); and

(b) The Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, who ordered those actions for wrongful death transferred from that district to the District of Massachusetts (R. 72).

Respondents are:

The 30 executors or administrators representing the estates of 23 decedents,[1] who brought these 37 actions against the corporate and governmental defendants (Respondents are hereinafter referred to as "plaintiffs").

II. The decision of the court of appeals now before this Court for review.

Defendants have asked this Court to review a decision of the Court of Appeals for the Third Circuit

[1] The actions subject to the order of the court of appeals are identified in Exhibit "B" to that order (R. 84-92). Although corporate defendants in their Brief in No. 56, p. 3, refer to five personal injury actions as well, the order of the court of appeals which is the subject of the instant certiorari was directed only to the wrongful death actions (R. 77, 80-92).

which held that a writ of mandamus should issue directing the district court to vacate its order transferring these wrongful death actions to the District of Massachusetts. The court of appeals so held for the reason that the death actions could not have been brought in the District of Massachusetts (R. 71-77).

This Court, by orders dated April 15, 1963, granted defendants' petitions for certiorari (R. 97-98).

III. The facts of record upon which the court of appeals rendered its decision.

Twenty-six of the 30 representative plaintiffs are citizens of Pennsylvania and residents of the Eastern District of said state (R. 23, 32-33, 36, 41).[2]

Each of the decedents whose estates are represented by the fiduciary plaintiffs died on October 4, 1960, in an airplane crash in Boston Harbor, Massachusetts (R. 1-2).

Twenty-two of the decedents died residents of Pennsylvania with their assets located in Pennsylvania (R. 23, 33, 36-37).[3]

Twenty-nine of the 30 plaintiffs are fiduciaries duly appointed by a Register of Wills of Pennsylvania

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[2] Plaintiff Doris A. Laister was a citizen and resident of Pennsylvania at the time of commencing her action but has since moved to Florida (R. 41). Plaintiffs Long and Manney in the *Reitz* case are residents of the Middle District of Pennsylvania, and plaintiff Braff is a resident of Camden County, New Jersey (R. 29).

[3] Plaintiff Braff's decedent died a resident of Camden County, New Jersey (R. 29).

(R. 23, 34, 36)[4], and 25 have never been appointed or licensed as fiduciaries by any officers or agency of Massachusetts.[5] The same 25 have not filed any action with respect to their respective decedents in any court other than the United States District Court for the Eastern District of Pennsylvania.

Nevertheless, defendants moved to transfer each of these actions to the District of Massachusetts.

Those motions were granted by the United States District Court for the Eastern District of Pennsylvania and an order of transfer was entered (R. 21-22).

The court of appeals subsequently directed the district court to vacate that order (R. 79-81).

IV. The respective positions of the parties before this Court.

Defendants claim that:

The decision of the court of appeals setting aside the order of transfer was erroneous and should be reversed because:

---

[4] Plaintiff Braff was appointed administratrix ad prosequendum and general administratrix by the Surrogate's Court of Camden County, New Jersey.

[5] Three of the exceptions involving five plaintiffs are stated in corporate Petitioners' Brief in No. 56, p. 8. In addition, plaintiffs in the *Braff* and *Reits* cases brought separate actions against the United States in the Eastern District of Pennsylvania, but those actions were ordered transferred to the District of Massachusetts pursuant to 28 U.S.C. § 1406(a) for lack of proper venue (R. 77, 95-96). During the period that the instant cases were pending before the court of appeals, plaintiffs Braff, Long, and Manney applied for and obtained appointment as fiduciaries in Massachusetts.

(a) such transfer is not contrary to the provisions of 28 U.S.C. § 1404(a);

(b) such transfer is required in the interests of efficient administration of the courts in airplane disaster cases; and

(c) the issuance of a writ of mandamus by the court of appeals was improper in that this extraordinary writ was not available to plaintiffs.

Plaintiffs claim that:

To the contrary, the decision of the court of appeals setting aside the order of transfer is correct and should be affirmed because:

(a) such transfer is precluded by the letter and intent of 28 U.S.C. § 1404(a) and Rule 17(b) of the Federal Rules of Civil Procedure, as construed by prior decisions of this and other courts; and

(b) such transfer would delay and complicate rather than expedite the disposition of airplane disaster cases, and would be contrary to the interests of justice in that, at great expense, inconvenience and delay to plaintiffs, it would unreasonably impair their right to select the forum, and greatly prejudice their substantive rights under the law of damages; and

(c) the issuance of a writ of mandamus by the court of appeals was proper inasmuch as the district court did not certify any controlling question of law pursuant to the provisions of the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), and the transfer constituted a misuse of judicial power.

SUMMARY OF ARGUMENT

The district court lacked power under 28 U.S.C. § 1404(a) to transfer these actions to the District of Massachusetts because that district was not one where they "might have been brought." All but one of plaintiffs are Pennsylvania fiduciaries representing the estates of Pennsylvania decedents. The great majority of plaintiffs, having never qualified as fiduciaries in Massachusetts, are barred by the terms of Fed. R. Civ. P. 17(b) from bringing suit in the district court of that state, since the federal rule incorporates state law governing capacity to sue of personal representatives.

I. In Massachusetts, plaintiffs' lack of capacity would be an absolute defense to their actions. This lack of capacity is substantial and not merely technical, since qualification in that state as a fiduciary entitled to bring a tort action requires a separate proceeding in a different court involving several steps. The probate court exercises discretion in determining the suitability of proposed fiduciaries and has sometimes rejected ostensibly qualified persons for various reasons. Plaintiffs who are corporate fiduciaries would be subject to more onerous and perhaps prohibitive qualification procedures involving both the courts and regulatory bodies. Even if plaintiffs could now qualify, their capacity at the time of filing their complaints determines whether these actions "might have been brought" in Massachusetts within the meaning of

§ 1404(a) as construed in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

II. Plaintiffs' incapacity to bring these actions in Massachusetts cannot be cured by the attempted waiver of defendants. The § 1404(a) provision limiting transfer to districts where the action "might have been brought" includes the federal incorporation of state policies in Rule 17(b), which adopts state law governing capacity, as well as the bars of lack of venue and jurisdiction over the person. Courts deciding similar transfer motions involving a plaintiff's lack of fiduciary capacity in the proposed transferee forum have so held. *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 57 (S.D. Calif. 1955). *Goranson* v. *Capital Airlines, Inc.*, U.S.D.C.E.D. Va., Richmond Div., C.A. No. 3545, April 10, 1963. The importance of the state policy given effect by Rule 17(b) is shown by the large number of states with capacity statutes similar to that of Massachusetts.

III. Transfer of these actions imposes substantial burdens on plaintiffs. Defendants argue that transfer would result in "efficient" and "expedited" disposition of disaster cases but produced no evidence whatever to support their contention. The experience of trial courts supports the inference that consolidation of these 37 actions with 114 others in Massachusetts will result in complicated and cumbersome discovery and trial, prolonging the litigation far beyond the expectable time for the determination of these 37

actions were plaintiffs permitted to proceed independently. Most importantly, transfer from a forum in a state with a strong constitutional and decisional policy in favor of compensatory tort damages to a forum in a state with an almost unique policy of limited and penal damages cannot be in the "interest of justice" since such transfer gravely jeopardizes plaintiffs' rights to adequate compensation for their losses and raises intricate and unsolved problems of choice of laws.

Transfer would also deprive plaintiffs of their right to have the crucial conflict of laws issue decided by a court sitting in Pennsylvania and intimately familiar with the history, policy, and provisions of Pennsylvania law rather than by a court sitting in Massachusetts, regularly deciding death actions under Massachusetts law and necessarily influenced by the contrary history and policy of that law.

IV. Mandamus has been repeatedly recognized as the proper remedy when the district court ordering transfer exceeds its power but does not certify the question as appealable in any order or opinion.

ARGUMENT

I. These 37 representative actions could not have been brought in Massachusetts.

In its decision below, the court of appeals fully accepted the argument that these death actions could not have been brought in Massachusetts. *Barrack*

Van Dusen, 309 F.2d 953, 956-958 (3d Cir. 1962) (R. 74-77). The Government candidly concedes that defendants would have had the defense of plaintiffs' lack of capacity in Massachusetts, Brief in No. 80, p. 10, although it attempts to minimize the significance of this concession.

However, the corporate defendants both dispute plaintiffs' lack of capacity and attempt to minimize its importance. It is therefore appropriate to review the relevant law of Massachusetts in light of Section 1404(a), *Hoffman* v. *Blaski,* and Rule 17(b).

The relevant transfer statute, 28 U.S.C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

This court held in *Hoffman* v. *Blaski,* 363 U.S. 335 (1960), that the phrase "where it might have been brought" can not be interpreted to mean "'where it may now be rebrought, with defendants' consent.'" 363 U.S. at 342-43.

Rule 17(b) of the Federal Rules of Civil Procedure provides that, other than in cases of individuals suing on their own behalf, and with certain other exceptions not material here:

> "... capacity to sue or be sued shall be determined by the law of the state in which the district court is held. ..."

Plaintiffs are individuals and corporations suing in their representative capacities.

Under the law of Massachusetts, if an administrator or executor appointed in another state brings suit in Massachusetts without first qualifying in Massachusetts and the defendant makes a timely motion to dismiss, the motion must be granted. *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E.2d 195 (1948), citing *Brown* v. *Boston & M. R.R.*, 283 Mass. 192, 186 N.E. 59 (1933).

In the *Boutillier* case, a death action was brought in Massachusetts by a New Hampshire administratrix who had been appointed by a New Hampshire probate court. The defendant failed to make a timely motion to dismiss, but in reviewing the applicable Massachusetts law Chief Justice Qua, speaking for a unanimous Supreme Judicial Court of Massachusetts, said:

> "It is settled in this Commonwealth that an administrator appointed in another jurisdiction is not thereby qualified to maintain an action here under our death statute." 322 Mass. at 496, 78 N.E.2d at 196.

That rule of law is amplified by the Massachusetts statute which provides that if the complaint alleges that a party is duly qualified to bring the action in a representative capacity, that allegation shall be taken as admitted *unless* it is controverted in the specified manner within the specified time. Mass. Ann. Laws, ch. 231, § 30 (1956).

Thus, a defendant in Massachusetts may as a matter of right terminate an action brought by an out-of-state fiduciary by controverting the plaintiff's allegation of capacity to sue.

Corporate defendants therefore do not contend that plaintiffs' 37 representative actions actually could have been brought in Massachusetts. Instead they argue that even though plaintiffs lacked the requisite capacity to bring an action in Massachusetts, they probably could have obtained the necessary qualification if they had tried to do so.

But in order to obtain ancillary appointment in Massachusetts it would have been necessary for these individual plaintiffs to institute in the Massachusetts Probate Court a separate and distinct proceeding, the outcome of which would have been doubtful at best. Moreover, in some of these cases the separate proceeding could not have been completed prior to the expiration of the statutory period of one year within which these representative actions were required to be brought.

Section 1 of Chapter 193 of the Annotated Laws of Massachusetts (1955), which applies to non-resident intestates, among others, provides:

> "§ 1. *Administration, to Whom Granted.* Administration of the estate of a person deceased intestate shall be granted to one or more of the persons hereinafter mentioned and in the order named, if competent and suitable for the discharge of the trust and willing to undertake it,

unless the court deems it proper to appoint some other person:

"First, The widow or surviving husband of the deceased.

"Second, The next of kin or their guardians or conservators as the court shall determine.

"Third, If none of the above are competent or if they all renounce the administration or without sufficient cause neglect for thirty days after the death of the intestate to take administration of his estate, one or more of the principal creditors, after public notice upon the petition.

"Fourth, If there is no widow, husband or next of kin within the commonwealth, a public administrator."

With respect to the identity of the person appointed, the priorities set forth in the statute are normally respected, Newhall, *Settlement of Estates and Fiduciary Law in Massachusetts*, § 47 (4th ed. 1958), but they are subject to the judgment of the Probate Court as to the suitability of the applicant.

Of the instant plaintiffs representing intestate estates, only the decedents' widows are within the priorities set forth in the statute. Not all plaintiffs so qualify. For instance, administrator Rapp of the Zeller estate is neither the surviving spouse, next of kin or their guardian, nor a creditor.

The requirement that the applicant be adjudged suitable by the court is clarified by a number of authorities. In *Morgan v. Morgan*, 267 Mass. 388,

166 N.E. 747 (1929), the Supreme Judicial Court upheld the refusal of a Probate Court to appoint an intestate's widow as administratrix. In so doing, the court considered the meaning of the statutory phrase "unless the court deems it proper to appoint some other person," and held that:

> "The apparent purpose of this amendment [to the statute] was to give the Probate Court a new discretionary power to consider the competency and suitableness of the petitioning party for the discharge of the trust. Upon the record presented to this court the decree dismissing the petition of Mrs. Morgan cannot be said to be wrong as [a] matter of law." 267 Mass. at 393, 166 N.E. at 748.

Again, in *Davis, Petitioner,* 237 Mass. 47, 129 N.E. 366 (1921), the Supreme Judicial Court defined "suitable persons", as used in the statute providing for the appointment of administrators, as follows:

> ". . . The words 'suitable persons' have no statutory or other fixed and inflexible meaning in this connection. Their context in connection with the history of the statute shows that they were intended to confer a wide discretion upon the Probate Court. They authorize the appointment of the person or persons who appear in the exercise of sound and discerning judgment in the light of all the circumstances of the particular case to be best equipped by temperament, experience and sagacity to discharge the trust with fidelity, prudence and promptness. The appointee should be a fitting person having regard to the

> special conditions of each estate and those interested in it as creditors, legatees, and next of kin. Suitableness is capacity founded on the innate and acquired qualities of the particular person in his relation to the situation of the estate to be administered, and to those directly and indirectly to be affected by the settlement of the estate. Attention may be given to personal characteristics and to all the other causes, not easily susceptible of enumeration, rationally affecting a judicious selection." 237 Mass. at 49-50, 129 N.E. at 366-67.

Other cases to the same effect are *Black* v. *Dobbins,* 325 Mass. 587, 91 N.E.2d 782 (1950); *Gordon* v. *Shea,* 300 Mass. 95, 14 N.E.2d 105 (1938); see Newhall, *Settlement of Estates and Fiduciary Law in Massachusetts* § 47, pp. 172-3 (4th ed. 1958). In *Black* v. *Dobbins,* the Probate Court declined to appoint as administrator "a reputable member of the bar of this Commonwealth" nominated by the next of kin and appointed instead another member of the bar nominated by other heirs. 325 Mass. at 589, 91 N.E.2d at 783.

Where a non-resident dies testate, as for example in the case of plaintiff Scott's decedent, the procedure for the appointment of an ancillary administrator in Massachusetts is also regulated by statute. Mass. Ann. Laws, ch. 192, §§ 4, 9, 10 (1955). Those provisions require a judicial hearing after newspaper publication and a finding by the court as to the propriety of the contemplated appointment.

In this situation as well there is no obligation that the Probate Court appoint as representative in Massachusetts the executor or executors named in the will. There are numerous cases in which the Probate Court has refused to do so. *E.g., Osborne* v. *Craig*, 251 Mass. 169, 146 N.E. 263 (1925); *Martin* v. *Otis*, 233 Mass. 491, 124 N.E. 294 (1919); *Cogswell* v. *Hall*, 183 Mass. 575, 67 N.E. 638 (1903).

Here, in the *Scott* case, plaintiff administrator was appointed to succeed a previous administrator who in turn was appointed upon the named executor's refusal to serve. It is therefore well open to question whom the Probate Court of Massachusetts might choose to appoint.

In the case of a non-resident ancillary administrator, there is a further statutory requirement in Massachusetts that a resident be appointed agent for service of process before the former can enter upon his duties. Mass. Ann. Laws, ch. 195, § 8 (1955). Such an administrator must also post a suitable bond. Mass. Ann. Laws, ch. 205, § 1 (1955).

The corporate fiduciaries involved in these actions would be able to qualify as fiduciaries in Massachusetts only because Pennsylvania grants reciprocal privileges to Massachusetts corporate fiduciaries. Mass. Ann. Laws, ch. 167, § 45A (Supp. 1962). To achieve such qualification, each corporate fiduciary would be required first to submit itself to the regulatory and taxing jurisdiction of Massachusetts by making application to the board of bank incorporation for a certifi-

cate authorizing it to transact business in Massachusetts. Mass. Ann. Laws, ch. 167 § 37 (1959); ch. 167 § 45A (Supp. 1962). Without such authority to transact business, a foreign corporation may not act in a fiduciary capacity in Massachusetts. *Re Guaranty Trust Co.*, 248 Mass. 319, 143 N.E. 46 (1924).

In summary, therefore, in order for an ancillary administration to be achieved in Massachusetts, it is necessary that there be a formal judicial proceeding prior to and separate from any other litigation, that certain substantive requirements be met, and that the court give its approval to the applicant. As noted, there are numerous instances in which the court has not given such approval.

Neither Section 1404(a) nor any decision of this Court suggests that the phrase "might have been brought" is intended to include actions which might have been brought only after the successful conclusion of entirely separate legal proceedings uncertain as to outcome.

Still further, defendants' arguments do not take into account another aspect of these cases which bars transfer.

All of plaintiffs' decedents died on the date of the crash, October 4, 1960 (R. 1-2).

The Massachusetts wrongful death statute, Mass. Ann. Laws, ch. 229, § 2 (Supp. 1962), provides:

> "An action to recover damages under this section shall be commenced within one year from the date of death . . ."

Thus, under the statute, a personal representative must bring his action within one year from the date of death of his decedent. This requirement is an integral part of the statute creating that right of action rather than a statute of limitations. Mass. Ann. Laws, ch. 229, § 2 (1962 Supp.); *Bickford* v. *Furber*, 271 Mass. 94, 170 N.E. 796 (1930); *Crosby* v. *Boston Elevated Ry.*, 238 Mass. 564, 131 N.E. 206 (1921).

As set forth above, each of the plaintiff fiduciaries would have had to petition the Probate Court for a license to commence these actions. In the case of a testamentary estate, publication of such application must be given commencing at least thirty days before the hearing. Mass. Ann. Laws, ch. 192, §§ 4, 9, 10 (1955). In the case of an intestacy, fourteen days' notice of the filing of the petition for appointment is required. Mass. Ann. Laws, ch. 204, § 3 (1955).

These time factors are significant because at least two of the instant actions, *Frankenfield* (an intestate estate) and *Scott* (a testate estate), were commenced in the lower court less than fourteen days before the expiration of one year from the date of death (R. 34-35) and plaintiff Scott was not appointed a fiduciary in Pennsylvania until October 2, 1961, one day before the expiration of his right to commence an action for wrongful death.

Thus, apart from all other obstacles to qualification in Massachusetts, time alone made it impossible for some of these plaintiffs to have qualified in Massachusetts before the last day upon which the suits could have been commenced.

All of the foregoing considerations aside, however, this Court has specifically held in *Hoffman v. Blaski*, 363 U.S. 335, 342 (1960), that the phrase "where it might have been brought" relates only to the time of the bringing of the action and whatever might have been done before the action was commenced or whatever might have been done after the action was commenced can not increase the number of forums "where it might have been brought."

The Government in its brief concedes this to be the case, saying, "We agree that, as the court of appeals held, the words, 'where it might have been brought', have reference to a situation 'at the time [plaintiff] filed its original complaint.'" Brief for Petitioners in No. 80, p. 12. In this the Government is of course correct.

In *Hoffman* v. *Blaski*, 363 U.S. 335, 342 (1960), the appellants contended that the phrase "where it might have been brought" should be held to relate not only to the time of bringing the action but also to the time of transfer.

But this Court then flatly rejected that contention:

> "We do not agree. We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean . . . 'where it may now be rebrought, with defendants' consent.' This Court has said in a different context, that § 1404(a) is 'unambiguous, direct [and] clear,' *Ex parte Collett*, 337 U.S., at 58, and that

'the unequivocal words of § 1404(a) and the legislative history . . . [establish] that Congress indeed meant what it said.' . . . we think the dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures, Inc.* v. *Rodney*, 186 F.2d 111 (C.A. 3d Cir.), correctly answered this contention:

"'But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.'" 363 U.S. at 342-43.

Consequently, whatever action the parties might have taken before or after the commencement of suit is of no bearing on the effect of Section 1404(a), since the action must be examined, not as it might have been, but as it was on the day it was commenced.

The corporate defendants' other attempt to minimize the importance of plaintiffs' lack of capacity to bring these suits in Massachusetts depends upon their flat statement that "if plaintiffs lack capacity to sue in Massachusetts, they are equally without capacity in Pennsylvania". Brief for Petitioners in No. 56, p. 23. In this, however, they are plainly mistaken.

Defendants are correct in stating that Rule 2207 of the Pennsylvania Rules of Civil Procedure requires that an action for wrongful death brought in Pennsylvania to enforce rights arising under the laws of another jurisdiction "shall be brought by the person

authorized to bring the action by the law of the jurisdiction where the cause of action arose." However, the decisions of the courts of Pennsylvania, as well as the decisions of this Court and the courts of Massachusetts, demonstrate that when the law of the jurisdiction where the cause of action arose vests that action in "the executor or administrator of the deceased," as does the Massachusetts statute, Mass. Ann. Laws, ch. 229, § 2 (Supp. 1962), the administrator or executor appointed in Pennsylvania may bring an action in Pennsylvania, regardless of his lack of capacity to sue in Massachusetts.

Rule 2207 "is declaratory of the Pennsylvania rule of conflict of laws". Note to Rule 2207, 332 Pa. cxix (1939). Goodrich, *Conflict of Laws,* § 104, p. 301 (1949), states that "unless the [foreign] statute limits suit to named beneficiaries, or a particular administrator or personal representative, an administrator appointed at the forum may institute the action." See Restatement, Conflict of Laws, § 396 (1934). This is the rule in Pennsylvania. *McIntyre* v. *Barr,* 85 Pa. D. & C. 507 (C.P. 1953); *Papciak* v. *Palmer,* 82 Pa. D. & C. 381 (C.P. 1952).

Defendants' cited case, *Brennan* v. *Rooney,* 139 F. Supp. 484 (E.D. Pa. 1956), is merely an example of one of the exceptions to the rule mentioned by Judge Goodrich, in that the New Jersey statute there involved vests the cause of action in the "administrator ad prosequendum." Since no such appointment exists under Pennsylvania law, capacity to sue in

Pennsylvania may be created only by appointment in New Jersey.

Plaintiffs' right to bring these actions in the forum of their appointment is also supported by a decision of this Court, *Dennick* v. *Railroad Co.*, 103 U.S. 11, 17-20 (1880), and by the weight of authority in other jurisdictions. Annotation, 52 A.L.R.2d 1016 (1957). The policy of Massachusetts also helps determine that the rights created by the statute of that state may be enforced in another forum without the appointment of a personal representative in Massachusetts. *Dickinson* v. *Jones*, 309 Pa. 256, 163 Atl. 516 (1932). Massachusetts has likewise adopted the view that such qualification is not necessary. *Hanlon* v. *Frederick, Leyland & Co.*, 223 Mass. 438, 111 N.E. 907 (1916).

In no sense whatever, then, under the law of Massachusetts, could these actions have been brought in that state. For this reason, as set forth below, the actions could not as a matter of law be transferred to the District of Massachusetts.

II. Transfer of these 37 representative actions to the District of Massachusetts would be improper.

Transfer of these 37 representative actions to the District of Massachusetts is precluded by the expressed intent of Congress as set forth in Section 1404(a), prior decisions of this Court and other courts and major considerations of policy embodied in the law of the states and the Federal Rules of Civil Procedure.

A. *Such transfer would be improper because of the expressed intent of Congress in 28 U.S.C. § 1404(a).*

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

These words are "unambiguous, direct and clear," "unequivocal" and establish "that Congress meant what it said." *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960); *Ex parte Collett*, 337 U.S. 55 (1949).

These words thus defeat defendants' argument and prevent transfer of these 37 representative actions to Massachusetts.

Defendants argue that these words are not to be so taken, however, but rather were intended to convey a meaning in flat contradiction of the plain and unambiguous meaning. Defendants in effect rewrite the statute to read:

> "For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought *against the defendant whether or not plaintiff could actually have brought it.*"

But nothing whatever in the statute itself, in its legislative history, or in the decided cases lends the slightest support to such construction.

In attempted support of their interpretation, corporate defendants argue. Brief in No. 56, pp. 10-11,

that the presence of § 1404(a) in the Venue Chapter of the Judicial Code indicates "that Congress intended the 'might have been brought' requirement to be limited to districts in which proper venue and jurisdiction existed," citing numerous instances of similar phrases in the Code.

Precisely that argument was rejected by this Court in *Ex Parte Collett*, 337 U.S. 55, 59 (1949) where the petitioners argued that the phrase "any civil action" as used in § 1404(a) was limited to only those classes of actions referred to in the preceding sections of the Code for which special venue provisions were made. To accept that contention, said this Court, would be to disregard the Congressional admonition that "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any section is placed . . .," citing the Act of June 25, 1948, 62 Stat. 869, 991, § 33.

The words "where it might have been brought" necessarily imply a plaintiff who could bring the action and necessarily exclude a plaintiff who could not "bring" the action. This is the meaning assumed to be correct by this and other courts when referring to the section. For example, in *Hoffman* v. *Blaski*, 363 U.S. 335, 344 (1960), this Court said:

> "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the ac-

tion 'might have been brought' *by the plaintiff.*" (Emphasis added.)

No more clear and unmistakable evidence of the "plain meaning" of those words could be found than the inferences drawn by this Court.

The expressed intent of Congress as it appears in § 1404(a) precludes the transfer of these cases to a district in which they could not have been brought by plaintiffs.

B. *Such transfer would be improper because of prior decisions of this and other courts.*

Defendants contend that § 1404(a) precludes a transfer only where the action could not be brought in the transferee district for lack of proper venue or jurisdiction of the person of defendant.

To the contrary, there are decisions in which transfer under § 1404(a) has been refused not for lack of venue or jurisdiction of the person of the defendant in the transferee district but for other reasons, including lack of jurisdiction of the subject matter and lack of capacity to sue, i.e., lack of jurisdiction of the person of the plaintiff.

For example, in the case of *Russell* v. *Cunningham,* 191 F. Supp. 82 (D. Guam 1961), plaintiff, a resident of California, brought a personal injury action in Guam against a defendant who was also a resident of California. After the complaint was filed, plaintiff moved under § 1404(a) to transfer the case to the United States District Court for the Northern

District of California. Defendant resisted the motion upon the ground that plaintiff could not have brought his action in the transferee court since both parties were residents of California.

The Court sustained defendant's position and refused the transfer on the ground that plaintiff could not have brought his action in the transferee court and therefore the Northern District of California was not a district in which the action "might have been brought" within the meaning of Section 1404(a).

In so holding, the district court cited *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), as authority and quoted this Court's statement that the power of a district court to transfer depends upon whether the transferee district was one in which the action "'might have been brought' by the plaintiff." 191 F. Supp. at 83, citing 363 U.S. at 343-44.

A similar decision on exactly the point involved in the instant case likewise refused transfer under § 1404(a) on the same ground even before *Hoffman* v. *Blaski*.

In *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (S.D. Calif. 1955), plaintiffs were executors appointed by the Superior Court of California. Their action in the United States District Court in California was founded on a contract between their testator and defendants, jurisdiction being based on diversity of citizenship. Defendants moved under Section 1404(a) to transfer to Texas. Plaintiffs opposed the motion, arguing that there had been no

appointment of a personal representative capable of bringing suit in that state. The court denied the motion to transfer and held:

> "[I]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process and in which the plaintiff may bring the action.
>
> * * * * *
>
> "It is well settled that unless such right is given to him by statute, an executor or administrator cannot sue in his representative capacity in any state or country other than that in which his letters testamentary or administration were granted . . .
>
> "Defendants contend that a foreign executor may sue in the Texas courts unless timely objection is made, and that in the instant case, the defendants have waived their objection by filing the motion to transfer." 136 F. Supp. at 579.

But the court rejected that argument by defendants, stating that plaintiffs did not have a right to bring the action in Texas and that therefore, as a matter of law, the court lacked the power to transfer the action to that district. 136 F. Supp. at 581-82.

Although the facts of the *Felchlin* case are virtually identical with those of the instant actions, defendants mention it only in footnotes. See Brief for Petitioners in No. 56, p. 15 n. 14; Brief for Petitioners in No. 80, p. 22 n. 29. They contend that it is distinguishable from the present actions because under

the law of Texas, the transferee forum in that case, a suit brought by a foreign personal representative is a nullity and objection to suit by a foreign administrator cannot be waived in Texas as in Massachusetts. Even assuming that such were the case, however, the distinction is irrelevant for transfer purposes because it serves only to make the dismissal of the action in the transferee district mandatory by the Court, as in situations involving jurisdiction of the subject matter, rather than optional to the defendant, as in situations involving venue. In *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), of course, lack of venue in the transferee district was held to bar transfer.

The most recent case pertinent to the present controversy, decided only a few months ago, is *Goranson* v. *Capital Airlines, Inc.*, U.S.D.C.E.D. Va., Richmond Div., C. A. No. 3545, April 10, 1963. Because of their special relevance, the order and memorandum of the court in that case are printed herewith as Appendices "A" and "B" respectively.

In that case, plaintiff Goranson, an administrator of the estate of a decedent killed in the crash of an airliner in Virginia, brought suit for wrongful death in the Northern District of Ohio where the decedent had been domiciled. On motion of defendants the case was transferred under Section 1404(a) to the Eastern District of Virginia. Plaintiff then commenced an action for mandamus in the Court of Appeals for the Sixth Circuit in order to prevent transfer, but the

petition was denied. *Goranson* v. *Kloeb*, 308 F.2d 655 (6th Cir. 1962.)[6]

When the transfer had been effected, plaintiff promptly moved in the transferee district for remand to the Northern District of Ohio on the ground that a fiduciary appointed in Ohio is without capacity to sue in Virginia and therefore his cause of action might not have been brought in Virginia. (Appendix B, p. 2a).

The district court granted plaintiff's motion and ordered that the action be remanded to Ohio. In so doing the court made a number of comments apposite to this case:

> "The plaintiff, who had no capacity to sue in Virginia, was under no mandate to move for the appointment of an ancillary administrator in order that the suit which he brought in Ohio might have been brought in Virginia.
>
> "This Court must consider this case in the posture that it was at the time plaintiff instituted it in Ohio. [quoting from *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960).]
>
> * * *
>
> "At the time this case was filed in Ohio it could not have been brought in Virginia because the plaintiff lacked capacity to sue in Virginia.

[6] Defendants here cite this case as authority for transfer "even though plaintiff contended that the damages recoverable in the transferee forum would be less than those recoverable in the transferor forum." Brief for Petitioners in No. 56, p. 15 n. 16. In fact, in permitting the transfer the court of appeals stated expressly that the amount of damages recoverable would be subject to the identical limitation in both forums. 308 F.2d at 656.

At the time it was transferred to Virginia it could not have been brought in Virginia because he still lacked capacity to sue in Virginia. At the present time he lacks capacity to sue in Virginia.

"The Court is of the opinion that the Virginia statutes pertaining to the appointment of fiduciaries are so broad that the defendants could move for the appointment of an ancillary administrator, but this would avail them nothing. [quoting again from *Hoffman* v. *Blaski*, 363 U.S. 335, 342-343 (1960).]

* * * *

"The defendants contend that the plaintiff waived his right to relief under this motion '* * * by failing to raise and argue that point either before District Judge Kloeb or in the Mandamus proceeding before the Sixth Circuit'. . . . This contention is without merit. The question of capacity to sue raises an issue of jurisdiction over the person of the plaintiff. *Rybolt* v. *Jarrett*, 112 F.2d 642, 648 (4th Cir. 1940); *Holt* v. *Middlebrook*, 214 F.2d 187 (4th Cir. 1954). Jurisdictional questions can be raised at any time. Jurisdiction must be reexamined by the transferee court. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

"While jurisdiction over the person may be waived, *Hoffman* v. *Blaski, supra*, at 343, the plaintiff has done no act to waive it. He has resisted the transfer to Virginia, and the maintenance of this suit in Virginia at every opportunity. As a non-resident of Virginia, he is not charged with knowledge of Virginia law. Further-

more, the burden was not upon plaintiff to satisfy the requirements of 1404(a)." Appendix B, pp. 6a-8a.

Nor does the decision in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), upon which defendants place great reliance, support their arguments. This Court there held that an admiralty *in rem* action was in substance an action against the owner of the *res* and that if the owner could have been sued personally in the transferee district the action may be transferred to that district, although the *res* itself was not within the jurisdiction of the transferee court when the action was brought. Throughout its opinion this Court emphasized the fictional nature of the action against the ship and commented:

> "We are asked here, however, to transplant this ancient salt-water admiralty fiction into the dry-land context of *forum non conveniens*, where its usefulness and possibilities for good are questionable at best." 364 U.S. at 23.

The court of appeals properly distinguished the decision in *Continental Grain*, commenting that it "is no help to defendants for that decision is premised on a fiction peculiar to the admiralty law." 309 F.2d at 957 (R. 76).

In addition, the *Continental Grain* case is distinguishable because the plaintiff, which resisted the transfer, was already engaged in litigation with the movant defendant in the transferee district on "pre-

cisely the same issues" raised in the action in the transferor court. 364 U.S. at 25-26.

The weight of authority in this and other courts thus supports the position of plaintiffs and gives no basis for that of defendants.[7] It negates defendants' unsupported contention that the phrase "where it might have been brought" relates only to lack of venue or jurisdiction of the person of the defendant as distinguished from that of the plaintiff and precludes a transfer of the instant cases.

C. Such transfer would be improper because of major considerations of federal and state policy embodied in Federal Rule of Civil Procedure 17(b).

Most of the states, forty-four of fifty, have decided as a matter of policy that out-of-state administrators may not sue in their courts. They have specifically so provided by statute. See citations collected in corporate Petitioners' Brief in No. 56, pp. 17-19.

In this connection, the Government, Brief in No. 80, pp. 13-22, makes the point that the phrase "might have been brought" relates only to federal law and has no reference to state law as such. Assuming, *arguendo*, that this position were well taken, nonetheless the Federal Rules of Civil Procedure have expressly engrafted the policies of the individual states into the scheme of federal procedure. Those rules de-

[7] The cases cited by the Government, Brief for Petitioners in No. 80, p. 23 n. 29, as contrary authority do not even mention the lack of plaintiffs' capacity to sue in the proposed transferee districts, if such capacity were lacking.

clare that the capacity of a fiduciary to sue in a United States district court shall be determined by the law of the state in which the district court is held. Fed. R. Civ. P. 17(b).

From the point of view of local policy, there are substantial reasons why the states exercise a measure of control over foreign fiduciaries. Such legislation is designed, inter alia, to protect local citizens who are potential defendants from suits by more than one fiduciary purporting to represent the same decedent and protect all persons from losses caused by the actions of irresponsible out-of-state fiduciaries.

To circumvent the local safeguards of forty-four states by permitting unqualified out-of-state fiduciaries to bring suit on behalf of their decedents in the local United States district court would be a grave affront to the policies of those states and contrary to the federal policy expressed in Rule 17(b).

Since plaintiffs here were not qualified to sue in Massachusetts, they were not qualified to sue in the United States district court in Massachusetts and the District of Massachusetts was not a district in which these actions "might have been brought."

III. Transfer under these circumstances would be contrary to the interest of justice.

Other considerations in addition to those referred to by the court of appeals in the instant case and by this Court in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), furnish substantial independent grounds for

the refusal to transfer these cases from the forum in which plaintiffs brought them properly and in good faith. These considerations give meaning to the phrase "interest of justice" which appears in Section 1404(a) and demonstrate that a transfer of these cases would violate essential concepts of basic fairness and justice.

A. *Transfer would be contrary to the interest of justice because it would cause great expense, inconvenience and delay to plaintiffs and would unreasonably impair their right to select the forum.*

Within the requirements of proper venue, a plaintiff may sue in the forum of his choice. Unless the balance is strongly in favor of granting relief to the defendant, "the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp* v. *Gilbert*, 330 U.S. 501, 508 (1947).

This is particularly true where, as here, all but one of the plaintiffs brought suit in the forum of their domicile, Pennsylvania, as fiduciaries representing estates of decedents domiciled in Pennsylvania at the time of their death.

Moreover, in this case most of plaintiffs' compensatory damage witnesses come from the Eastern District of Pennsylvania or near it (R.6), and other witnesses will probably be called from as far away as Indiana and California (R.7) to whom the difference between Philadelphia and Boston is *de minimis*.

Transfer of these actions would impose upon plaintiffs the heavy additional difficulties and expenses of conducting from Philadelphia litigation in Boston. Defendants have made no showing that plaintiffs are able to bear them. This was defendants' burden, *cf. Gulf Oil Corp* v. *Gilbert,* 330 U.S. 501, 508 (1947), and defendants presented no evidence to sustain it.

The harsh imposition of transfer upon plaintiffs in frank derogation of their right to select their forum resulted in part at least from a concern that, unless the cases are brought together before a single judge, there may be some plaintiffs who will recover damages as a result of the subject airplane disaster and some who will not (R. 10). The defendants appear to urge that this possibility of inconsistent verdicts is so undesirable as to justify transfer regardless of the other circumstances of these cases.

But it is not possible to transfer to Boston all cases arising out of this accident. At least two such cases are awaiting trial in the Court of Common Pleas of Philadelphia County[1] from which they cannot be removed to the federal courts, much less transferred by them. There may well be other similar actions pending in courts of other states. Thus, the issue of liability for this air crash must be litigated in Philadelphia and, perhaps, elsewhere.

Moreover, Section 1404(a) is not the basis for

[1] *Shackton* v. *Eastern Air Lines, Inc.* (two cases), C. P. No. 4, Sept. Term, 1961, No. 238 and C. P. No. 6, Sept. Term, 1961, No. 237 (Phila. Co.).

a transfer designed to promote "efficiency" or "uniformity" at the cost of great inconvenience and expense to plaintiffs. Section 1404(a) does not permit a transfer for such reasons. Indeed, the section does not even permit a transfer "in the interest of justice" but only "for the convenience of parties and witnesses, in the interest of justice."

All but three of these 30 plaintiffs in good faith exercised their undisputed right to select their forum by choosing the one closest to them. This was a reasonable and valid choice which was theirs as a matter of right. An order of transfer, at great inconvenience, delay and expense to these plaintiffs, even though for the benefit of defendants, is an improper invasion of their right to choose their forum.

B. *Transfer would be contrary to the interest of justice because it would prohibit the expeditious disposition of aircraft disaster cases.*

Throughout both defendants' briefs and the opinion of the district court there is a basic theme, sometimes implied, sometimes expressed, that trial and disposition of the pending cases will be expedited if they are consolidated with those similar cases originally brought in Massachusetts. In ordering transfer, Judge Van Dusen directed a major section of his opinion to this point, captioning it:

> *"Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and ex-*

pense for the public, including jurors, and other litigants awaiting trial." (R. 8).

The corporate defendants make the same claim. Brief for Petitioners in No. 56, pp. 16-17.

There is no question that this contention of both the lower court and defendants has a certain appeal —in theory. But the reality is otherwise.

The reported case noted below and the general experience of trial courts establish that consolidation of airplane disaster cases for pretrial and for trial does not achieve savings in time and expense for the courts, the parties, the witnesses or the public. To the contrary, such consolidation in mass aircraft disaster litigation serves to delay the disposition of cases and to produce results not in the interest of justice. For example, it is evident that:

a. Discovery is greatly protracted by consolidation. Discovery by one or a few plaintiffs' counsel is far more expeditious than simultaneous discovery in all cases by all counsel,[8] and where one or a few plaintiffs proceed alone with discovery there is very little likelihood of substantial additional discovery by other counsel in companion cases.

b. Consolidation strongly discourages settlement by or with individual plaintiffs which in turn deprives certain individual plaintiffs of prompt recovery and deprives defendants of "discounted" compromises.

[8] In the briefs on the merits filed in this proceeding, there are *eight* individual law firms named. This list, of course, does not include those other lawyers whose appearances are entered in the Massachusetts cases.

c. Consolidation induces the prosecution of actions against all possible defendants by all plaintiffs where, proceeding individually, much of such effort would be tactically and practically unnecessary.

d. A joint trial involving numerous parties is far more cumbersome and inefficient than the trial of a single plaintiff's case, and the trial of a single plaintiff's case can, and in all likelihood would, serve as a basis for settlement of most if not all of the remaining actions.

Data as to the foregoing inferences are of course unreported but it is not plaintiffs' burden to prove in these proceedings that transfer would delay the ultimate disposition of these cases. Were the court authorized by § 1404(a) to order transfer at great expense, inconvenience and delay to plaintiffs and their witnesses for the sake of "expediting" disposition of the cases, then minimum standards of justice would require that defendants, the moving parties, satisfy the court by credible evidence that transfer actually would expedite disposition. No evidence of any such nature was proffered by defendants in this case, however.

But there is available some evidence to show what happens when aircraft disaster cases are consolidated. It merits attention here as an example of the evils of consolidation described above.

On April 21, 1958, a United Airlines DC-7 passenger craft was struck in mid-air by a fighter plane

of the United States Air Force, causing the death of forty-two passengers. Twenty-two cases were initiated in or transferred to the Southern District of California and all were consolidated there for all purposes. Discovery was conducted by all counsel in concert and depositions were taken in three districts.

Despite the fact that these cases, as well as those in two other districts, were assigned to the same judge, and despite the relative simplicity of the accident,[10] discovery proceedings were in the opinion of that court "'exceedingly extensive, expensive and burdensome in time and effort.'" *United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709, 712 (E. D. Wash., D. Nev. 1962).

That court then went on to say:

> "In spite of the efforts of the Court to do everything possible to bring about an expeditious trial and prevent delays in the Southern California cases, and in spite of the very great diligence of counsel in their conduct of discovery proceedings, a pre-trial order could not be framed and a definite trial date set until October, 1961, [the accident having occurred on April 21, 1958] at which time the cases were set for trial on February 6, 1962. The time then estimated for trial on liability was six weeks, but actually took 15 weeks." 216 F. Supp. at 713.

[10] In contrast to the instant cases, where the aircraft crashed on takeoff in good weather, and where there are still open questions of airframe design, engine design, crew training, airport maintenance, traffic control, and migratory bird habits, to name only some.

The Court went on to relate the history of the case, including the fact that there were separate trials to the same jury on damages, the last verdict being returned on August 31, 1962, almost four and one-half years after the accident. Finally, in its opinion dated December 7, 1962, the Court said, "Since August 31, 1962, the Court's time from day to day, until recently, has been almost completely consumed with the arguments . . . and . . . prolonged hearings with counsel . . ." 216 F. Supp. at 713.

Consolidation means that every one of numerous parties and attorneys must be afforded every opportunity to participate in every stage of the proceedings whereas, left to their own efforts, a few plaintiffs will prosecute their cases as far as may be necessary and the vast majority will settle on the basis of their result.

Just as a committee of 30 will expectably accomplish less in a given time than a committee of three, so too the disposition of airplane disaster cases is delayed, not expedited, by mass consolidation.

C. *Transfer would be contrary to the interest of justice because it would gravely prejudice plaintiffs' substantive rights under the law of damages.*

While defendants do not so state, it is not unlikely that their ultimate reason for seeking transfer is to move to a forum where recoveries for wrongful death are restricted to sharply limited punitive damages rather than compensation for the loss suffered.

Massachusetts and Alabama are the only two states in the United States having statutes imposing a penal or punitive restriction on damages for wrongful death. *Massachusetts Bonding & Insurance Co.* v. *United States,* 352 U.S. 128, 130-131 (1956).

The Massachusetts wrongful death act, Mass. Ann. Laws, ch. 229, § 2 (Supp. 1962), provides with respect to accidents occurring prior to January 1, 1963, that a person who negligently causes the death of another "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability . . . ."

The Massachusetts law is based solely on culpability of the tort-feasor without regard to the pecuniary loss suffered by defendent's nearest relatives. This Court so held in *Massachusetts Bonding & Insurance Co.* v. *United States,* 352 U.S. 128, 129 (1956), quoting from the decision in *Macchiaroli* v. *Howell,* 294 Mass. 144, 147, 200 N.E. 905, 906-907 (1936), which held that "The chief characteristic of the statute is penal." Compensatory damages may not be awarded as they would be under Pennsylvania law. 12 Pur. Pa. Stat. Ann. §§ 1601-1604 (1953); *Spangler* v. *Helm's N.Y.-P. Motor Express,* 396 Pa. 482, 153 490 (1959).

Pennsylvania forbids such a limitation of damages in death actions. The Pennsylvania Constitution, Art. III, § 21, provides that the General Assembly may enact workmen's compensation laws, "but in no

other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death. . . ." Because of the policy reflected in this constitutional provision, there is strong reason to believe that Pennsylvania courts would not enforce the penal limitation on damages contained in the Massachusetts act. If they would not, a federal district court sitting in Pennsylvania must also refuse to enforce that limitation. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

The strength of this public policy is shown by the decisions of the Supreme Court of Pennsylvania which hold that statutory limitations on recovery in actions for negligence are violative even of the general guarantees contained in the Pennsylvania Declaration of Rights. *Thirteenth & 15th St. Passenger Ry* v. *Boudrou*, 92 Pa. 475, 481-82 (1880); *Lombard & So. Sts. Passenger Ry.* v. *Steinhart*, 2 Pennypacker 358 (Pa. Supreme Ct. 1882); *Central Ry* v. *Cook*, 1 Pa. Weekly Notes of Cases 319 (Pa. Supreme Ct. 1875).

Furthermore, the Pennsylvania courts will not enforce the penal provisions of a foreign statute, even when those provisions are also remedial in nature. *Nesbitt* v. *Clark*, 272 Pa. 161, 116 Atl. 404, *cert. denied*, 258 U.S. 621 (1922); *Commercial National Bank* v. *Kirk*, 222 Pa. 567, 71 Atl. 1085 (1909).

While Pennsylvania courts have not yet considered the Massachusetts statute, both state and federal courts in New York have adopted and set

forth the rule which Pennsylvania is most likely to follow.

In *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), plaintiff's decedent was killed in an airplane crash in Massachusetts. Both plaintiff's decedent and the plaintiff were New York domiciliaries. The plaintiff brought suit for wrongful death in the state courts of New York. The New York Court of Appeals, in an opinion by Chief Judge Desmond, declared that New York would refuse to give effect to the Massachusetts penal provision limiting recovery because that provision contravened the public policy of the state of New York.

The Court of Appeals further held that the plaintiff could recover the compensatory damages which are recoverable under the New York wrongful death act, without any of the restrictions imposed by Massachusetts. The court looked to and quoted from Article 1, Section 16, of the New York Constitution as an expression of the public policy of that state. It provides that "the right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

Subsequently, in *Pearson* v. *Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), the United States Court of Appeals for the Second Circuit, sitting *en banc*, reversed the decision of a panel of the Court of Appeals, 307 F.2d 131 (1962), and held that the *Kilberg* principle is

fully consistent with the Constitution of the United States.

The rejection by New York of the penal limitations of the Massachusetts act is more than likely to be followed by the Pennsylvania courts. This is so, not only because of the reasons with regard to "contacts", but also because of the analogous New York and Pennsylvania constitutional prohibitions.

In both the spirit and the letter of Section 1404(a) are the inseparable concepts of convenience *and* justice. In the absence of either concept a transfer fails to fulfill the statutory purpose. Justice still means giving each what he deserves; doing that which is fair. Such principles would be torn asunder by transferring these cases to a forum which is not only inconvenient and expensive for these plaintiffs and many of the essential witnesses, but which would impose upon their substantial claims a harshly restrictive punitive measure of damages which is alien to the law of the jurisdiction where their decedents resided at the time of their death; where substantially all of their interested survivors still reside; where almost all of the fiduciaries are domiciled and received their court appointments; in which all decedents made their ill-fated contracts of transportation; to which all of them were returning when death struck; and where all of the defendants do business.

"Convenience" cannot here overbalance the enormous potential loss to 37 plaintiffs and their beneficiaries which might result from transfer. The expense

to the four defendants of a trial in the District Court in Pennsylvania cannot outweigh the detriment that 23 estates will suffer should they be subjected to the radically different measure of damages which Massachusetts would apply to these suits. An order placing convenience ahead of the protection of substantive rights and the private interest of the litigant violates rather than furthers the interest of justice.[11]

This Court, in *Gulf Oil* v. *Gilbert*, 330 U.S. 501, 508 (1947), prior to the enactment of Section 1404(a), listed the "private interest of the litigant" first among the factors to be considered in this situation. That is still true under Section 1404(a). In *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955), this Court held that even though the discretion under Section 1404(a) is broader than under the former doctrine of *forum non conveniens*, "this is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered . . . ." 349 U.S. at 32. Even under *Norwood* "'the interest of justice' still remains the primary and decisive factor" in the determination of transfer motions. *Coffill* v. *Atlantic*

[11] Transfer of these cases to Massachusetts would create additional issues involving the application to transferred cases of the doctrines of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). There is a conflict of authority on the crucial issue of whether the transferee court must apply the whole law of the transferor state, including that state's conflicts principles and public policy. Compare *Headrick* v. *Atchison T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950) and *King Bros. Productions, Inc.* v. *RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271 (S.D.N.Y. 1962), with *Viaggio* v. *Field*, 177 F. Supp. 643 (D. Md. 1959) and *Brainard* v. *Atchison T. & S.F. Ry.*, 87 F. Supp. 921 (D. Kan. 1950). See generally Currie, *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353 (1955).

Coast Line R.R., 180 F. Supp. 105, 107-8 (E.D.N.Y. 1960).

Pennsylvania has no less an interest in the protection of its domiciliaries than does New York as to its citizens. The most significant factor here involved is plaintiffs' need to have so fundamental an issue as the proper measure of damages in these actions brought in Pennsylvania determined in the district of their permanent Pennsylvania residence, where the policy of state law will probably prevent the emasculation of their claims which may occur in the distant forum.

Coupled with the above considerations is the additional truth that it would be injudicious and unfair for the district court in Massachusetts to make a fundamental determination of Pennsylvania law upon which the courts of Pennsylvania have not spoken. The district court in Pennsylvania, on the other hand, together with the United States Court of Appeals for the Third Circuit, is familiar with the substance and underlying philosophy of Pennsylvania law. This Court has said, when speaking of "the intermediate federal appellate courts", that "the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Cf. *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). Wisdom and

propriety dictate that this crucial determination of Pennsylvania law be made by the district court sitting in Pennsylvania.

IV. Mandamus is a proper remedy here.

All defendants below and the Government in this Court have suggested that mandamus was not available to plaintiffs as a remedy, even if the trial court's order of transfer were improper.[12] They base this suggestion on two contentions:

(1) Plaintiffs failed to avail themselves of the Interlocutory Appeals Act, 28 U.S.C. § 1292, and

(2) Mandamus should not be used to review an order of transfer.

Neither of these contentions withstands analysis.

The Government maintains that "Respondents should have proceeded by seeking to invoke the Interlocutory Appeals Act, 28 U.S.C. 1292(b)" (Brief for Petitioners in No. 80, p. 27), but that Act states, in pertinent part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from

[12] Judge Van Dusen by a footnote to his brief filed in the Court of Appeals refused to "join in presenting this question [of the propriety of mandamus] for review . . . because he does not wish to object to an attempt to review his actions on [other] grounds." Brief for Respondent and Intervenors, 3d Cir., Nos. 13994, 13997, 14003, 14011, and 14033, p. 1 n.

> the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . ."

Under the Act an interlocutory appeal is possible only if the lower court includes the necessary statement in his order. No such statement appears in the order in this case (R. 21-22) or in the accompanying opinion (R. 1-20).

In a recent article Professor Charles Alan Wright wrote:

> "The statute seems to leave the initiative to the trial judge to certify the case as appropriate for appeal, and does not require, nor even expressly contemplate, an application for the requisite certificate from the parties." Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199, 207 (1959).

See also *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958), where the Court of Appeals for the Third Circuit commented that "both the district judge and the court of appeals are to exercise independent judgment in each case . . . ." Nor is there any requirement in the Federal Rules of Civil Procedure or in the Rules of the Eastern District of Pennsylvania that an aggrieved party make application to the court for such a certificate.

But in any event the writ of mandamus is available to review orders of transfer. As the Government concedes, this is exactly what was done by the court of appeals in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), and, tacitly at least, approved by this Court.

In spite of that recent precedent, the Government argues that the decision in *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), may somehow bar use of the writ. In that case this Court affirmed the dismissal by the Court of Appeals for the Sixth Circuit of an application for mandamus where, after an order of transfer under Section 1406(a) of the Judicial Code because of lack of venue, plaintiff complained that proper venue had existed in the transferor district.

Mr. Justice Clark, speaking for the majority, described plaintiff's argument as "frivolous" and held, inter alia, that the petitioner had failed to show that its rights to issuance of the writ was "clear and indisputable" 346 U.S. at 384.[13] The remaining features of the *Holland* case which distinguish it from the instant controversy are fairly set out in the Government's brief.

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[13] Mr. Justice Frankfurter, dissenting on the ground that the writ of certiorari should have been dismissed as improvidently granted, emphasized the weakness of the plaintiff's argument when he said:

"Discussion of mandamus in this case is not even useful as *dicta* for future guidance on an important issue . . . This Court ought not to be called upon to hold that where a district judge refused to entertain a 'frivolous' claim, mandamus will not issue to compel him to entertain it. But that is the only holding of the Court's decision today." 346 U.S. at 387-88.

On the other hand, there is ample and convincing precedent for plaintiffs' position that mandamus does lie for the review of improper orders of transfer. The basic authority is the All Writs Act which reads:

> "The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Appellate courts of several circuits have expressly held that, under the All Writs Act, mandamus lies to review an order of transfer. *Swindell-Dressler Corp.* v. *Dumbauld*, 308 F.2d 267 (3d Cir. 1962); *Lemon* v. *Druffel*, 253 F.2d 680 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *Chicago R. I. & P.R.R.* v. *Igoe*, 212 F.2d 378 (7th Cir. 1954), 220 F.2d 299 (1955), *cert. denied*, 350 U.S. 822 (1955). This is certainly true, regardless of other limitations, where the trial court has granted or denied transfer erroneously as a matter of law. *Paramount Pictures, Inc.* v. *Rodney*, 186 F.2d 111 (3d Cir.), *cert. denied*, 340 U.S. 953 (1951).

As the court of appeals said in its opinion in the matter now before the Court, it is "abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a)." 309 F.2d at 956-57 (R. 73).

CONCLUSION

For the reasons stated the decision of the court of appeals directing that the order of transfer be vacated should be affirmed.

Respectfully submitted,

SEYMOUR I. TOLL
Attorney for Respondents
Barrack, et al.

T. E. BYRNE, JR.
Attorney for Respondents
Biernbaum, et al.

LEE S. KREINDLER
ABRAM P. PIWOSKY
DAVID M. HASS
Attorneys for Respondents
Laister, et al.

JOHN R. McCONNELL
RALPH EARLE II
Attorneys for Respondents
Rapp, et al.

ABRAHAM E. FREEDMAN
MILTON M. BOROWSKY
MORRIS S. FINKEL
Attorneys for Respondents
Thompson, et al.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 3545

HENRY W. GORANSON,
ADMINISTRATOR OF THE ESTATE OF
HAROLD T. GORANSON

v.

CAPITAL AIRLINES, INC.,
UNITED AIRLINES, INC., ET AL.

ORDER

Upon consideration of the plaintiff's motion to transfer this action back to the United States District Court for the Northern District of Ohio, Western Division, for reasons stated in the Memorandum of the Court this day filed, it is

ORDERED that the motion is sustained and this action is transferred to the United States District Court for the Northern District of Ohio, Western Division.

Let the Clerk send copies of this order and of the Memorandum of the Court to:

JOSEPH J. LAWLER, JR., *Esquire*
HENRY W. GORANSON, *Esquire*
RALPH H. FERRELL, JR., *Esquire*
HARRY E. McCOY, *Esquire*
JACK N. HEROD, *Esquire*
ISRAEL STEINGOLD, *Esquire*

/s/ JOHN D. BUTZNER, JR.
United States District Judge

April 10, 1963

[Duly certified as a true and full copy by C. B. Watkins, Clerk of the United States District Court for the Northern District of Ohio, October 4, 1963, certificate omitted in printing.]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 3545

HENRY W. GORANSON,
ADMINISTRATOR OF THE ESTATE OF
HAROLD T. GORANSON

v.

CAPITAL AIRLINES, INC.,
UNITED AIRLINES, INC., ET AL

JOSEPH J. LAWLER, *Esquire*
(KELLAM and KELLAM, *Esquires*)
HENRY W. GORANSON, *Esquire*
(COBOURN, YAGER, SMITH and FALVEY, *Esquires*)
For Plaintiff

HARRY E. MCCOY, *Esquire*
(SEEWELL, MCCOY, WINSTON and DALTON, *Esquires*)
For Defendants

MEMORANDUM OF THE COURT.

This memorandum concerns the motion of Henry W. Goranson, Administrator, to transfer this action back to the United States District Court for the Western Division, Northern District of Ohio. Although the plaintiff calls it a motion to transfer, it will be referred to as a motion to remand. In order to understand this motion, it is necessary to briefly consider the proceedings in the case.

The cause of action arises from the death of Captain Harold T. Goranson, United States Navy, which occurred on January 18, 1960, while he was a passenger in a Capital Airlines plane that crashed in Virginia.

On February 13, 1960, the last will and testament of the decedent was admitted to probate by the Probate Court of Wood County, Ohio, and letters of administration with the will annexed were issued to Henry W. Goranson, who duly qualified as administrator.

On November 14, 1961, Henry W. Goranson, Administrator, filed suit against Capital Airlines and United Airlines in the District Court of the Northern District of Ohio, Western Division, Civil Action #8752, to recover damages for the death of Harold T. Goranson.

On January 12, 1962, the plaintiff caused Joseph J. Lawler to be appointed ancillary administrator, c.t.a., of the Estate of Harold T. Goranson in the Circuit Court of the City of Norfolk.

On January 15, 1962, Joseph J. Lawler, Administrator, filed suit in the Norfolk Division of the United States District Court for the Eastern District of Virginia against Capital Airlines, Inc., United Airlines, Inc., Vickers-Armstrongs (Aircraft) Ltd., and Rolls-Royce, Limited, to recover damages for the death of Harold T. Goranson.

On February 23, 1962, the defendants moved to transfer this suit which was pending in the Northern District of Ohio to the Eastern District of Virginia.

On May 22, 1962, the motion was granted. Thereafter, the plaintiff brought a mandamus proceeding in the United States Court of Appeals for the Sixth Circuit, to review the order of the District Court. The petition for mandamus was denied. *Henry W. Goranson, etc.* v. *Honorable Frank L. Kloeb*, 308 F. 2d 655 (6th Cir. 1962).

In order to understand the motion to remand it is necessary to consider briefly the original motion made by the defendants in the United States District Court in Ohio.

That motion was based upon four grounds: the convenience of the parties and witnesses; the interest of justice; for the reason that the action might have been brought in Virginia; and finally, for the reason that a similar action is presently pending in Virginia. The plaintiff opposed the motion by joining issue with the defendants on their allegations and by affirmatively urging that the case be retained in Ohio because Virginia has a $30,000.00 limitation for wrongful death suits and Ohio has none.

This Court holds that the issues raised in Ohio on the defendants' motion to transfer and the plaintiff's opposition thereto have been settled by the United States District Court for the Northern District of Ohio and the Court of Appeals for the Sixth Circuit. These issues will not be reexamined by this Court in this proceeding.

In the plaintiff's motion to remand he takes the position that as a fiduciary appointed in Ohio he is without capacity to sue in Virginia and for that reason the cause of action could not be brought in Virginia. An examination of the defendants' motion, the briefs filed by the parties, the memorandum of the United States District Court for the Northern District of Ohio and the opinion of the Court of Appeals for the Sixth Circuit, leads this Court to believe that the question of plaintiff's capacity to bring suit in Virginia was not raised on the motion to transfer from Ohio to Virginia.

The narrow issue presented by the plaintiff's motion to remand is whether the action might have been brought in this Court. This issue must be examined by this Court. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

Title 28 U.S.C., § 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"

Rule 17(b) of the Federal Rules of Civil procedure provides, in part:

> "• • •. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held • • • •."

Section 8-634, Code of Virginia, 1950, provides, in part, that every action for wrongful death:

> "• • • shall be brought by and in the name of the personal representative of such deceased person • • •."

Section 26-59, Code of Virginia, 1950 as amended, provides, in part:

> "No natural person not a resident of this State shall be appointed or allowed to qualify or act as personal representative, or trustee under a will, of any decedent, • • •."

The foregoing statutes and Rule 17(b), Federal Rules of Civil Procedure, prohibit Goranson, the Ohio administrator, from instituting an action for wrongful death in Virginia. *Holt* v. *Middlebrook*, 214 F. 2d 187 (4th Cir. 1954); *Grady* v. *Irvine*, 254 F. 2d 224 (4th Cir. 1958).

In *Barrack* v. *Van Dusen*, 309 F. 2d 953 (3rd Cir. 1962), the Court held that a civil action could not be transferred from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Massachusetts. In that case the plaintiff was the administrator of a person who had been killed in an airplane crash. The plaintiff lacked capacity to sue in Massachusetts. The Court said at 309 F. 2d 957:

> "We think that the holding in Hoffman *v.* Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum

at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). * * *."

In *Barrack,* the Court pointed out that in Massachusetts the appointment of an ancillary administrator was discretionary with the Court. For this reason the defendants urge that *Barrack* is not controlling. The defendants emphasize that under the Virginia law a probate court must appoint an ancillary administrator and the Court's discretion is limited only to the appointment of a suitable person. §§ 64-112, 114, 124, Code of Virginia, 1950.

The difference between the Massachusetts law and the Virginia law is not a sound basis for distinguishing *Barrack* from the case at bar. At 309 F. 2d 957, 958, Judge Staley said:

> "The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court. Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of those petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in Hoffman, petitioners did not have an independent right to maintain suit in Massachusetts.
>
> "* * * *. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman *v.* Blaski, supra, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district."

The plaintiff, who had no capacity to sue in Virginia, was under no mandate to move for the appointment of an ancillary administrator in order that the suit which he brought in Ohio might have been brought in Virginia.

This Court must consider this case in the posture that it was at the time the plaintiff instituted it in Ohio. In *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960), Mr. Justice Whittaker states:

> "* * *. The transferee courts could have acquired jurisdiction over those actions only if properly brought in those courts, or if validly transferred thereto under Section 1404(a). * * *."

At the time this case was filed in Ohio it could not have been brought in Virginia because the plaintiff lacked capacity to sue in Virginia. At the time it was transferred to Virginia it could not have been brought in Virginia because he still lacked capacity to sue in Virginia. At the present time he lacks capacity to sue in Virginia.

The Court is of the opinion that the Virginia statutes pertaining to the appointment of fiduciaries are so broad that the defendants could move for the appointment of an ancillary administrator; but this would avail them nothing. Mr. Justice Whittaker said in *Hoffman* v. *Blaski*, 363 U.S. 335, 342-343 (1960):

> "* * *. We do not think the Section 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may now be rebrought, with defendants' consent.' This Court has said, in a different context, that Section 1404(a) is 'unambiguous, direct (and) clear,' *Ex parte Collett*, 337 U.S., at 58, and that 'the unequivocal words of Section 1404(a) and the legislative history * * * (establish) that Congress indeed meant what it said.' *United States* v. *National City Lines, Inc.*, 337 U.S. 78, 84. Like the Seventh Circuit, 260 F. 2d, at 322, we think the dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (C.A. 3rd Cir.), correctly answered this contention:

'But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.'"

The defendants contend that the plaintiff waived his right to relief under this motion "* * * by failing to raise and argue that point either before District Judge Kloeb or in the Mandamus proceeding before the Sixth Circuit". (Page 10, Defendants' brief on motion). This contention is without merit. The question of the capacity to sue raises an issue of jurisdiction over the person of the plaintiff. *Rybolt* v. *Jarrett*, 112 F. 2d 642, 648 (4th Cir. 1940); *Holt* v. *Middlebrook*, 214 F. 2d 187 (4th Cir. 1954). Jurisdictional questions can be raised at any time. Jurisdiction must be reexamined by the transferee court. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

While jurisdiction over the person may be waived, *Hoffman* v. *Blaski*, *supra*, at 343, the plaintiff has done no act to waive it. He has resisted the transfer to Virginia, and the maintenance of this suit in Virginia at every opportunity. As a non-resident of Virginia, he is not charged with knowledge of Virginia law. Furthermore, the burden was not upon the plaintiff to satisfy the requirements of 1404(a). It was the defendants who moved for transfer, and failed to bring this matter to the attention of the United States District Court in Ohio.

The defendants also assert that since an identical suit was brought by Goranson, Administrator, through the ancillary administrator Lawler in the Virginia court, that this Court does have jurisdiction of the suit that was originally brought in Ohio. This contention is also without merit. While both suits seek to recover damages for the death of Harold T. Goranson, the suits are not identical.

Additional parties have been included in the suit brought in Virginia by Lawler, the ancillary administrator, and an additional count, based on breach of contract, has been included in that suit.

Moreover, the test set forth in 1404(a) for transferring an action to another district is whether a civil action "might have been brought" in the transferee court. This test or requirement is in no way qualified or eliminated by the language of the statute because a similar suit is pending in the transferee court.

The motion to remand this case to the United States District Court for the Northern District of Ohio is granted.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

April 10, 1963

[Duly certified as a true and full copy by C. B. Watkins, Clerk of the United States District Court for the Northern District of Ohio, October 4, 1963, certificate omitted in printing.]